

MAR 05 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUCIANO RODRIGUEZ-VENEGAS,

Defendant - Appellant.

No. 08-30174

D.C. No. 2:07-cr-02120-EFS-1

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Eastern District of Washington  
Edward F. Shea, District Judge, Presiding

Submitted February 18, 2009<sup>\*\*</sup>

Before: BEEZER, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Luciano Rodriguez-Venegas appeals from the 57-month sentence imposed following his guilty-plea conviction for being an alien in the United States after

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Rodriguez-Venegas contends that the district court erred by miscalculating his criminal history score as a result of an erroneous factual finding that he had continuously remained in the United States following a February 2006 arrest. We conclude that, in light of Rodriguez-Venegas's pattern of residency in the United States and the lack of countervailing evidence indicating that he voluntarily returned to Mexico, the district court did not clearly err. *See United States v. Romero-Rendon*, 220 F.3d 1159, 1161-63 & n.4 (9th Cir. 2000); *see also United States v. Marin-Cuevas*, 147 F.3d 889, 895 (9th Cir. 1998) (factual determinations relevant to criminal history calculation reviewed for clear error).

Rodriguez-Venegas also contends that his sentence is illegal because the government did not allege in the indictment or prove beyond a reasonable doubt that he was deported subsequent to an aggravated felony conviction. However, the indictment alleged a date of removal that was subsequent to the date of his aggravated felony conviction, and Rodriguez-Venegas admitted to the same date of removal at his change of plea hearing, such that it was not error for the district court to enhance his sentence. *See United States v. Beltran-Munguia*, 489 F.3d

1042, 1052-53 (9th Cir. 2007); *United States v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008).

Rodriguez-Venegas further contends that: (1) *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), has been overruled; (2) a 2-year statutory maximum applies because his case is distinguishable from *Almendarez-Torres* in that he never admitted the existence of an aggravated felony during the guilt phase of his case; and (3) the doctrine of constitutional avoidance should be applied to § 1326(b). As Rodriguez-Venegas concedes, these contentions are foreclosed. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751 n.3 (9th Cir. 2007); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414-15 (9th Cir. 2000).

**AFFIRMED.**